European Business Initiative on Taxation (EBIT)

Comments on: "OECD Model Tax Convention: Revised proposals concerning the interpretation and application of Article 5 (Permanent Establishment)"

At the time of writing this submission, EBIT Members included: AIRBUS, BP, CATERPILLAR, EADS, GE, DEUTSCHE LUFTHANSA, INFORMA, MTU, NUTRECO, REED ELSEVIER, ROLLS-ROYCE, SAMSUNG ELECTRONICS and TUPPERWARE.

Mr. Pascal Saint-Amans
Director Centre for Tax Policy and Administration
OECD
2, rue André Pascal
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FRANCE

Brussels, 30 January 2013

Dear Pascal,

EBIT wishes to thank the OECD for the opportunity to give drafting comments only on the revised discussion draft entitled: "OECD Model Tax Convention: Revised proposals concerning the interpretation and application of Article 5 (Permanent Establishment)".

- **Issue 6: Time requirement for the existence of a PE (paragraph 6 of the Commentary)**

  At the OECD Paris meeting on 7 September 2012 and again in the present revised discussion draft, the Committee on Fiscal Affairs is proposing to replace the two earlier originally proposed exceptions to the general practice of Contracting States, that, unless a place of business is maintained for six months or more, it does not constitute a PE.

  EBIT wishes to reiterate that, as we have stated before, the carving out of exceptions from the current norm that places of business operated for less than six months, and especially as is proposed now, to bring this further down to three and four months, respectively, and, in some circumstances even to effectively four weeks, to constitute a PE is clearly a seriously unwelcome development as far as EBIT is concerned. To EBIT this proposed change appears to be hostage to fortune to source tax based countries.

  In terms of drafting changes, EBIT therefore suggests that both the paragraph 6.1 and 6.2 examples be qualified by the following additional wording "This illustration should nonetheless be considered to be very much the exception to the general rule that a permanent establishment does not exist unless it has subsisted for 6 months or more.", probably best added at the end of each of these paragraphs.

- **Issue 7: Presence of foreign enterprise's personnel in the host country (paragraph 10 of the Commentary)**

  EBIT continues to be of the opinion that whilst the proposed changes to paragraph 10 regarding secondees are helpful, the comments in paragraph 44 are of concern. These relate to the situation where a secondee remains on their home country payroll (often for HR / benefits / compensation / currency reasons) and the host company is charged on a cost plus basis. Paragraph 44 mentions the possibility that this cost plus indicates that what the secondee is doing in the host country is not part of the host company's activity but rather part of the home company's activity, hence there is PE exposure. Reference is then made to the criteria in paragraphs 8.13-8.15 of the Model Commentary regarding the host state company being the "economic employer " for Article 15 183 day protection purposes to avoid a home state company PE in the host country.

Whilst the changes are designed to be helpful, given the multiplicity of criteria in paragraphs 8.13-8.15, and the subjectivity sometimes involved e.g. who instructs the individual (matrix management), the outcome may not always be certain. In the worst case, this might leave MNCs with the choice of accepting a local "economic employer" and so host country taxation of secondees even where present for no more than 183 days in the host country or accepting a PE of the non-resident company in the host state. EBIT asks the Committee on Fiscal Affairs for further clarification.

- **Issue 8: Main contractor subcontracting all aspects of a contract (paragraphs 10 and 19 of the Commentary)**

  Despite the fact that some changes are proposed in the revised discussion draft, the issue relating to the overall responsibility of the contractor on the on-site operation by the sub-contractor has not been solved.

  As previously stated, Issue 8 should surely be dealt with under the dependent agency type PE rule rather than deeming the subcontractor(s) to be a PE of the non-resident main contractor. Also, this "principle" of deeming a third party subcontractor to be a new type of PE of the main contractor could be extended to other industries e.g. financial services regarding brokers acting for non-resident principals. EBIT believes this to be a very unhelpful proposal from the perspective of business.

  EBIT therefore strongly recommends that the wording change in paragraph 19 ie the addition of the words "all or" is not proceeded with and the necessary consequential changes are made.

  Equivalently, the "acting alone or" wording in paragraph 10.1 should be deleted and the necessary consequential changes should be made.

- **Issue 14: Does a development property constitute a PE? (paragraph 22 of the Commentary)**

  EBIT remains of the view that the OECD's analysis in paragraph 86 is incorrect in terms of interaction of treaty and domestic law. A domestic charge under the Business Profits Article 7 cannot be justified with respect to the host state being permitted to charge under the Capital Gains Article 13. EBIT would like to refer to the Malaysian High Court case of *DIGR v Euromedical Industries Ltd* [1983] Part 1 Case 14 [FCM], in this respect, where in the absence of a PE, Malaysia's domestic withholding tax on technical assistance fees paid to a UK parent was blocked (the fees being business profits for treaty purposes rather than royalties, but there being no Malaysian PE).

  As to drafting changes, at the very least the second sentence of paragraph 85 and note 9 on page 29 should be deleted.

- **Issue 19: Meaning of "to conclude contracts in the name of the enterprise" (paragraph 32.1 of the Commentary)**

  The proposed addition to paragraph 32.1 will expressly provide that a principal enterprise bound by a contract concluded by another person with a third party would not be protected from having a PE in the country of that other person merely by virtue of that other person not disclosing that it was acting for the principal enterprise in its dealings with the third party. This would in particular appear to be targeted at principals in commissionaire arrangements, but as it is worded it goes much wider than this, so the proposed clarification is not helpful according to EBIT, as the analysis is incomplete. The existence or otherwise of a PE should be with regard to all the facts and in particular the

conduct of the parties, and it would be preferable if the revised commentary expressly stated this.

EBIT trusts that the above comments are helpful and will be taken into account in finalising your Commentary on: "OECD Model Tax Convention: Revised proposals concerning the interpretation and application of Article 5 (Permanent Establishment)".

Yours sincerely,

The European Business Initiative on Taxation – January 2013

For further information on EBIT, please contact its Secretariat via Bob van der Made, Tel: + 31 (0) 6 130 96 296; Email: bob.van.der.made@nl.pwc.com).